NO. 04-147

In The

Supreme Court of the United States

MARVIN POLK, Warden, Central Prison,
Raleigh, North Carolina,

Petitioner,

v.

TIMOTHY LANIER ALLEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NOW COMES Respondent, Timothy Lanier Allen, and asks the Court to deny the State of North Carolina's Petition for Writ of *Certiorari* seeking review of the decision of the United States Court of Appeals for the Fourth Circuit granting a writ of habeas corpus and vacating Respondent Allen's death sentence.

As explained below, the Petition for Writ of *Certiorari* should be denied because the State has not presented a question worthy of this Court's review. The State disagrees with the Court of Appeals' 2254(d)(1) and harmless error analyses of a unique, unlikely-to-be-repeated constitutional error. Nowhere in the State's Petition is there any serious suggestion that the Court of Appeals applied the wrong legal standard. Rather, the State argues simply that the Court of Appeals erred in applying settled law to unique and unusual facts. No significant federal question is involved, nor is there any conflict in the Circuit Courts. The Petition should be denied.

JURISDICTION
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent is satisfied with the State's submissions as to jurisdiction and constitutional and statutory provisions and, pursuant to Supreme Court Rule 24.2, has nothing to add.

STATEMENT OF THE CASE

Respondent Timothy Lanier Allen was convicted and sentenced to death in Halifax County, North Carolina, in 1985. The State's evidence at trial showed that, on May 14, 1985, Raymond E. Worley, an officer with the State Highway Patrol, flagged down a stolen vehicle occupied by acquaintances of Respondent, Antonio Worrell and

Mack Green. Respondent and his brother, Alex Allen, also pulled over and, during the traffic stop, Respondent shot Officer Worley three times. Officer Worley likely lost consciousness within sixty seconds and died a few minutes later. All four men were subsequently apprehended and charged with murder. Only Respondent faced the death penalty. Based on the State's evidence, the trial court submitted to the sentencing jury two aggravating circumstances, that the capital felony was committed for the purpose of avoiding lawful arrest, N.C. Gen. Stat. § 15A-2000(e)(4), and was committed against a law enforcement officer while engaged in the performance of his official duties, N.C. Gen. Stat. §15A-2000(e)(8).

Respondent, who was then thirty years old, his mother, and his girlfriend testified in mitigation. Respondent's former wife, the mother of his oldest son, also testified. These friends and family members described how, as a child, Respondent witnessed frequent arguments and physical fights between his parents. These clashes terrified Respondent. As a consequence of his parents' bitter and violent arguments, Respondent's mother sought medical treatment for her son's nervous condition.

Respondent's parents had a particularly violent fight on Respondent's third birthday. The police were called and it was this fight that led Respondent's mother to separate from his father. Respondent was raised by his mother and grandmother. After his parents' separation and up until he was twelve, Respondent saw his father only three or four times a year.

When Respondent was around twelve years old and about to enter the sixth grade, his mother moved the family to Washington, D.C., where his father lived.

Although he was able to see his father more frequently, Respondent's teenage years were difficult. Respondent failed the sixth grade and, a few years later, at the age of fourteen or fifteen, started drinking alcohol. By the age of fifteen or sixteen, Respondent was using heroin. He dropped out of school and married his pregnant girlfriend when he was seventeen. Three years later, Respondent divorced his wife but maintained an ongoing, close relationship with his son, Timothy, Jr. Respondent's first wife and Timothy, Jr., both attended the sentencing hearing. There was also evidence that Respondent had some contact with his third son, but he was unable to locate or have contact with his second son because Respondent did not know where he lived.

Witnesses described Respondent as a shy, timid person who was bullied by others and was unwilling or unable to fight back. Other evidence showed that Respondent served a total of three years in prison for property crimes when he was in his twenties. Respondent obtained a GED and, when he was not incarcerated, Respondent maintained continuous employment. Prior to the capital offense, Respondent had never been convicted of any violent crime. A few hours before the capital offense, Respondent used drugs and there was evidence that he also drank alcohol. A doctor called by the State to evaluate Respondent the day after the shooting of Officer Worley testified that Respondent reported withdrawal symptoms. The doctor prescribed withdrawal medication for Respondent. Respondent and the law enforcement officers who interrogated him testified to Respondent's remorse for his actions.

Following the presentation of evidence at the sentencing hearing, the trial court submitted ten mitigating circumstances for the jury's consideration[1]:

1) Timothy Lanier Allen has no history of use of deadly weapons.

2) Timothy Lanier Allen expressed remorse about the death of the victim.

3) Timothy Lanier Allen completed his high school equivalency education by obtaining his GED.

4) Timothy Lanier Allen has no significant history of prior criminal activity.

5) The age of Timothy Lanier Allen at the time of the murder.

6) Timothy Lanier Allen was reared in a single parent home.

7) Timothy Lanier Allen is the father of three sons.

8) Timothy Lanier Allen remained employed during the times he was not incarcerated.

9) Timothy Lanier Allen was a supporting parent of at least one of his children.

10) Any other circumstances or circumstances arising from the evidence which the jury deems to have a mitigating value.

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[1] North Carolina law requires a trial judge to make an initial finding that the evidence presented supports the proposed mitigating circumstance. N.C. Gen. Stat. § 15A-2000(b). It is proper for a trial court to submit a mitigating circumstance to the jury only when it is supported by "substantial evidence." *State v. Laws*, 381 S.E.2d 609, 626 (N.C. 1989), *sentence vacated on other grounds by Laws v. North Carolina*, 494 U.S. 1022 (1990). The state court fact finding as to all ten of the mitigating circumstances submitted to Respondent's jury must be presumed correct. 28 U.S.C. § 2254(e)(1).

The jury deliberated for about four and a half hours before returning a verdict of death. Instructed that findings in mitigation must be unanimous, the jury found the first three mitigating circumstances on this list, but failed to find unanimously the remaining seven circumstances.

The trial court proceeded to poll the jurors. During the jury poll, the court clerk read the entire verdict form and the answers written on the form by the jury. This form included the question, "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" The clerk also recited that portion of the verdict form where jurors were instructed as to their findings in mitigation: "In the space after each mitigating circumstance, write 'yes' if you unanimously find that mitigating circumstance by a preponderance of the evidence" and "Write 'no' if you do not unanimously find that mitigating circumstance by a preponderance of the evidence." Among the mitigating circumstances recited by the clerk was the final mitigating circumstance which asked whether there were "any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value." Following the clerk's recitation of the entire, four-page verdict form, each juror was then asked:

- Are these the answers to your issues?
- Are these still the answers to the issues?
- Do you still assent thereto?

All of the jurors answered these three questions affirmatively.

On direct appeal, Respondent argued that the instruction and verdict form requiring juror unanimity on findings in mitigation were unconstitutional in light of *Mills v. Maryland*, 486 U.S. 367 (1988). The Supreme Court of North Carolina rejected this argument. *State v. Allen*, 372 S.E.2d 855, 868 (N.C. 1988). Respondent petitioned for *certiorari* review in this Court. While his *certiorari* petition was pending, this Court decided *McKoy v. North Carolina*, 494 U.S. 433 (1990), in which a nearly identical instruction was found unconstitutional. This Court remanded Respondent's case. *Allen v. North Carolina*, 494 U.S. 1021 (1990). On remand, the Supreme Court of North Carolina considered the *McKoy* error. *State v. Allen*, 417 S.E.2d 227 (N.C. 1992). The Court conceded that the trial court gave Respondent's jury the unanimity instruction deemed unconstitutional in *McKoy*, but concluded the error was harmless:

> In this case, ten mitigating circumstances were submitted to the jury. The jury found three of the mitigating circumstances and did not find seven of them. When the verdict was returned, the trial judge announced that the jury would be polled. She said, "[y]ou will be asked individually as to your answers to the issues and as to the recommendation." The clerk then polled the jurors by stating to each of them each mitigating circumstance and whether it was found or not. The clerk asked each juror whether these were the answers to "your issues," whether these were still the answers to the issues and whether he or she still assented thereto. Each juror answered in the affirmative.
>
> It appears from this poll that the jury was unanimous as to each of the mitigating circumstances which the jury failed to find. No juror would likely have considered such a circumstance in his or her determination as to imposing the death penalty if the charge had been correct on this feature of the case. We hold this error was harmless beyond a reasonable doubt. *State v. Laws*, 328 N.C. 550, 402 S.E.2d 673 (1991).

417 S.E.2d at 228.

Respondent brought forward his *McKoy* claim in his Petition for Writ of Habeas Corpus. The district court denied relief on this claim but issued a Certificate of Appealability. On February 5, 2003, following briefing and oral argument, a panel of the Fourth Circuit Court of Appeals issued an opinion finding that Respondent was entitled to a writ of habeas corpus on his *McKoy* claim. *Allen v. Lee*, 319 F.3d 645 (4th Cir. 2003). Applying 28 U.S.C. 2254(d)(1), the panel found that the Supreme Court of North Carolina's adjudication of Respondent's *McKoy* claim and its determination of harmlessness based on the jury poll were unreasonable. 319 F.3d at 648. According to the panel,

> The jury poll in this case neither instructed the jury nor amended an instruction. It merely confirmed a juror's vote based on the instructions already given by the court. Because the instructions themselves were unconstitutional, the poll merely confirmed that each juror followed these instructions in sentencing Allen to death. Thus, the poll alone could not possibly cure the error.

Id. at 657 (footnote omitted).

The State petitioned for rehearing. On April 28, 2004, following reargument, the U.S. Court of Appeals for the Fourth Circuit sitting *en banc* granted a writ of habeas corpus to Petitioner, vacated his death sentence, and ordered resentencing on the *McKoy* claim. *Allen v. Lee*, 366 F.3d 319 (4th Cir. 2003) (*en banc*). The judgment of the Court was issued in a *per curiam* opinion. Seven members of the Court of Appeals agreed that the Supreme Court of North Carolina's determination that the *McKoy* error was harmless beyond a reasonable doubt resulted in a decision that involved an unreasonable application of clearly established federal law as determined by this Court and that the error had a substantial and injurious effect on the sentencing verdict. 366 F.3d at 322.

Two members of the Court of Appeals filed opinions setting out why Respondent was entitled to habeas relief on his *McKoy* claim. *See id.* at 340-49 (plurality opinion of Gregory, J., Wilkins, C.J., and Michael, Motz, and King, J.J.), and *id.* at 332-40 (opinion of Traxler and Shedd, J.J.). Chief Justice Wilkins concurred in the plurality opinion and also wrote a separate concurrence joined by Judge Motz. *See id.* at 331-32. The State has asked this Court to review the Court of Appeals' decision to grant a writ of habeas corpus.

ARGUMENT

I. NO QUESTION WORTHY OF *CERTIORARI* REVIEW HAS BEEN PRESENTED.

The Court of Appeals granted relief on the basis of a constitutional error identified by this Court more than a decade ago in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990). Other than Maryland and North Carolina, only Pennsylvania has used the unanimity instruction on mitigating circumstances deemed unconstitutional in *Mills* and *McKoy*. In the nearly 15 years since *McKoy* was decided, no capital sentencing jury in the country has been given a unanimity instruction on mitigating circumstances. And just recently, this Court determined that the rule announced in *Mills* was not retroactively applicable to cases pending on habeas review. *Beard v. Banks*, 124 S.Ct. 2504 (2004). Consequently, the *en banc* plurality of the Court of Appeals was surely correct in noting that the constitutional error here was a "rare case" that was "not likely to arise anytime in the future," not least because "*McKoy* errors in general should be a remnant of the past." 366 F.3d at 343 (opinion of Gregory, J.).

Respondent's case is unique not only because it involves a long-ago-established constitutional error that tainted capital sentencing in only three states, but also because of the peculiar fact pattern underlying both the § 2254(d)(1) and *Brecht* analyses. In particular, the reasonableness of the state court's determination that the *McKoy* error was harmless turned on a textual analysis of a post-verdict jury poll. Similarly, the *Brecht* analysis turned on a careful reading of the trial record and weighing of the evidence in aggravation against the diverse mitigating circumstances not found unanimously by the jury. The likelihood of such a fact pattern recurring in the future is remote. Consequently, it can hardly be said that there is any serious public interest or important universal principle in Respondent's case.

The State has pointed to no significant constitutional rule at stake in this case. Indeed, the basis of much of the State's Petition appears to be the views of a single judge who dissented from the order denying the State's petition for rehearing of the Court of Appeals' *en banc* decision.[2] This is because the case involves a simple application of law to the peculiar facts presented. Accordingly, there is no credible suggestion in the State's Petition that the Court of Appeals applied the wrong legal standards to determine Respondent's entitlement to habeas relief pursuant to § 2254(d)(1) and *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Nor is there any evidence of a conflict in the Circuit Courts on any issue arising in Respondent's case. Consequently,

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[2] Contrary to rules of this Court, the State placed Judge Luttig's opinion dissenting from the denial of rehearing first in its Appendix. *See Rules of the Supreme Court of the United States*, Rule 14(i) (setting out sequence of orders and opinions to be contained in appendix).

this Court's interest in ensuring uniformity on issues of federal law is not implicated. For all of these reasons, this Court should not expend its scarce resources addressing the State's contention that the Court of Appeals erred in applying hornbook law to a singular set of facts.

II. THE COURT OF APPEALS PROPERLY APPLIED GOVERNING LEGAL STANDARDS TO RESPONDENT'S *McKOY* CLAIM.

A. The Court of Appeals Properly Construed 28 U.S.C. § 2254(d)(1) in Finding that the State Court's Adjudication of Respondent's *McKoy* Claim was Objectively Unreasonable.

The Court of Appeals properly concluded that 28 U.S.C. § 2254(d)(1) does not bar Respondent from obtaining habeas relief. Pursuant to this statutory provision, a federal court may not grant a writ of habeas corpus unless the state court's adjudication of the claim was "contrary to" or involved an "unreasonable application" of clearly established law as defined by this Court. The Court of Appeals found objectively unreasonable the Supreme Court of North Carolina's determination that the *McKoy* error in Respondent's case was harmless beyond a reasonable doubt. That finding should not be disturbed by this Court.

A state court adjudication is "unreasonable" when the state court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). In *Williams* and subsequent decisions, this Court has explained how a state court adjudication might be unreasonable pursuant to § 2254(d)(1).

One way a state court adjudication might be unreasonable is if the state court fails to consider all of the relevant evidence. *See Williams*, 529 U.S. at 416 (granting habeas relief on ineffective assistance of counsel claim and finding an unreasonable application of clearly established law because of the state court's "obvious failure to consider the totality of the omitted mitigation evidence"). *Williams* also illustrated a second way in which a state court adjudication might be unreasonable under § 2254(d)(1), namely the failure of the state court to "accord appropriate weight" to the body of relevant evidence. *Id.* at 398. In *Williams*, this failure was demonstrated by the state court's lack of analysis of the significance jurors might have given to unfound mitigation when weighed against the evidence in aggravation. *Id.*

In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court again applied § 2254(d)(1) to a claim of ineffective assistance of counsel and ordered habeas relief. *Wiggins* demonstrated that a state court adjudication is unreasonable when it does not evaluate the constitutional error from the vantage point of the parties at the time the error occurred. *See id.* at 527-28 (finding fault with state court for invoking "a *post-hoc* rationalization of counsel's conduct" rather relying on "an accurate description of their deliberations prior to sentencing"). The *Wiggins*' Court also indicated that a state court adjudication is unreasonable when it does not conduct a thorough analysis of the constitutional error. *See id.* at 527 (state court's application of *Strickland* standard was objectively unreasonable because the state court "merely assumed that [counsel's] investigation was adequate").

Applying these principles to Respondent's case, it is clear that the Court of Appeals properly concluded that the Supreme Court of North Carolina's determination of harmlessness was objectively unreasonable. First, as noted by the Court of Appeals, the Supreme Court of North Carolina failed to consider and give weight to all of the relevant record evidence, including the fact that the unconstitutional unanimity instruction was repeated in the post-verdict jury poll. 366 F.3d at 341-42. The court clerk read the entire verdict form before polling individual jurors. This form asked jurors, "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" The verdict form read to jurors during the poll also included a recitation of the instructions to, "write 'yes' if you unanimously find that mitigating circumstance . . . [and] . . . 'no' if you do not unanimously find that mitigating circumstance." *Id.* (emphasis supplied in Court's opinion). Only after hearing yet another recitation of the constitutional error were jurors asked one by one to confirm that they had followed the constitutionally flawed instruction. Indeed, a reasonable juror may have interpreted the poll to inquire no more than whether the jury foreperson had correctly filled out the verdict form in accordance with the unanimity instruction.

As noted by the Court of Appeals, no juror was asked how he or she individually voted on any of the mitigating circumstances, let alone how the juror would have voted had the trial court given different instructions as to findings in mitigation. *Id.* at 342. To the contrary, jurors were asked during the poll whether there were "any other circumstance or circumstances arising from the evidence which you, the jury, deem to

have mitigating value." *Id.* (emphasis supplied in Court's opinion). Thus, when jurors were asked, "Are these the answers to your issues?," "Are these still the answers to the issues?," and "Do you still assent thereto?," they were "not being asked for their individual votes" on the mitigating circumstances, but whether "they still assented to the jury's collective decisions." *Id.* As a consequence, "the poll merely confirmed that each juror followed the trial court's unconstitutional instruction in sentencing Allen to death." *Id.* at 341.

The North Carolina court was also unreasonable in failing to consider the poll from the vantage point of the jurors at the time of Respondent's sentencing hearing. When Respondent was tried and sentenced to death, *Mills* and *McKoy* had not yet been decided. Consequently, no one, including the trial court, regarded the poll as a curative device to determine the votes of each individual juror as to each individual mitigating circumstance. Under these circumstances, it was unreasonable for the North Carolina court to imbue the poll with power and meaning it did not have and to base its determination of harmlessness on a jury poll that was "never designed to, nor did it, cure the *McKoy* error." 366 F.3d at 341. Unlike the state supreme court, the Court of Appeals properly focused on the "critical stage" at which the unconstitutional error occurred and analyzed the "effects of the unanimity requirement on the jury's internal deliberations." *Id.* at 342. The Court of Appeals then concluded that the jury polled failed to "provide any meaningful insight . . . on the critical issue of whether any individual juror voted for a given mitigating factor." *Id.* The state supreme court's conclusion to the contrary was clearly unreasonable.

Finally, the Supreme Court of North Carolina's harmlessness determination was unreasonable because it "merely assumed" on the basis of jury poll that jurors had unanimously rejected the seven mitigating circumstances. 417 S.E.2d at 228. However, the *raison d'etre* of *McKoy* is the understanding that the unanimity instruction "allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a sentence less than death." *McKoy*, 494 U.S. at 439. Thus, as to the seven unfound mitigating factors, a "no" vote indicated no more and no less than the fact that anywhere from zero to eleven jurors may have believed the evidence to have mitigating value that weighed in favor of a life sentence for Respondent. In assuming that the poll necessarily demonstrated that jurors unanimously rejected the unfound mitigating circumstances, the state supreme court echoed the analysis expressly rejected by this Court in *Mills*. Certainly it was unreasonable after *Mills*, and even more so after *McKoy*, to make such an assumption.

The State has offered no persuasive reason why the decision of the Court of Appeals should be disturbed. Applying this Court's precedents dealing with § 2254(d)(1), the Court of Appeals properly found the state court's determination of harmlessness to be objectively unreasonable. The Writ of *Certiorari* should be denied.

B. The Court of Appeals Properly Applied the *Brecht* Harmless Error Standard to the Constitutional Error in this Case.

The Court of Appeals properly concluded that the *McKoy* error in Respondent's case had a "substantial and injurious effect" and thus, pursuant to *Brecht v. Abrahamson*, 507 U.S. 619 (1993), Respondent was entitled to habeas relief. Under *Brecht*, a writ of

habeas corpus may not be granted unless, "in light of the record as a whole," the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 638. When the habeas court is "in grave doubt" about whether the constitutional error had a substantial and injurious effect or influence in determining the jury's verdict, the error is not harmless and the writ must issue. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). From the perspective of the prisoner seeking habeas relief, the *Brecht* harmless error standard is less onerous than both preponderance of the evidence and the reasonable probability standard applied to claims of ineffective assistance of counsel and prosecutorial suppression of exculpatory evidence. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (finding of reasonable probability of different result "necessarily entails the conclusion" that error is harmless under *Brecht*).

In determining Respondent's entitlement to habeas relief, the Court of Appeals clearly applied this standard and articulated its reasoning in the three opinions filed in addition to the *per curiam* opinion. *See* 366 F.3d at 332 (opinion of Wilkins, C.J.) ("Based on my experiences as a trial judge and prosecuting attorney . . . I remain in grave doubt about whether the error was harmless."); *id.* at 337 (opinion of Traxler, J.) (" . . . the nature of the error in this case unquestionably leaves me in grave doubt as to whether it was in fact harmless."); *id.* at 349 (opinion of Gregory, J.) ("Thus, we hold that the *McKoy* error had a 'substantial and injurious effect or influence in determining the jury's verdict' warranting habeas relief under *Brecht*. At a minimum, the likelihood that a properly-instructed jury would not have voted to unanimously impose the death penalty is sufficiently great to raise 'grave doubt' as to whether the *McKoy* error was harmless.").

It is similarly clear that the Court of Appeals properly considered the *McKoy* error in the context of the entire record of Respondent's case, including the circumstances of the crime and aggravating circumstances. Indeed, the plurality opinion acknowledged that Respondent had committed a "terrible" and "horrible" crime, and noted no few than ten times the aggravating circumstances found unanimously by the jury. 366 F.3d at 344-48. *See also id.* at 332-33, 337-38 (opinion of Traxler, J.) (discussing crime scene, medical evidence, and aggravating circumstances).

The constitutional error in this case went to the heart of the life and death decision each of the twelve jurors was called upon to make. As a consequence of the constitutional error, Respondent was sentenced to death by a jury that was precluded from considering significant evidence in mitigation. In its three opinions, the Court of Appeals judges expressed their diverse views of the unfound mitigation. *See* 366 F.3d at 332 (opinion of Wilkins, J.) (emphasizing Respondent's close relationship with his eldest son and likelihood that reasonable juror could have concluded life sentence was appropriate based on "sincere feelings of mercy"); *id.* at 337 (opinion of Traxler, J.) (explaining "virtual equipoise" as to harmlessness of the error in light of evidence of Respondent's unfortunate background and "significant adolescent problems" as well as his close and ongoing relationships with family members, and positive record of employment); *id.* at 346 (opinion of Gregory, J.) (finding "sufficient likelihood" that at least one juror would have been persuaded to spare Respondent's life in light of evidence he was raised in single-parent home, witnessed his parents' petrifying physical fights, and "lost himself in alcohol and drugs").

That diversity reflects and supports the view that individual jurors, faced with this evidence of Respondent's life history and, considering it in conjunction with the unanimously-found circumstances of Petitioner's remorse and lack of criminal history, may well have been swayed to reject the death penalty. The Court of Appeals fully considered all of the evidence and properly concluded that the *McKoy* error in this case had a substantial and injurious effect or influence on the jury verdict.

CONCLUSION

For the reasons discussed herein, this Court should deny the State's Petition for Writ of *Certiorari*.

Respectfully submitted, this the 18th day of August 2004.

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In the Supreme Court of the United States

MARVIN POLK,
v.
TIMOTHY ALLEN,

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39 of the Rules of the Unites States Supreme Court, petitioner TIMOTHY LANIER ALLEN asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari, without payment of costs, and to proceed *in forma pauperis*. The undersigned has been appointed pursuant to the Criminal Justice Act, 18 U.S.C. §3006A.

Respectfully submitted,

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